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Before the
Federal Communications Commission
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Revisions of the Commission's Rules to) CC Docket No. 94-102
Ensure Compatibility with Enhanced)
911 Emergency Calling Systems)
)
Wireless E911 Phase II Implementation)
Plan of Nextel Partners, Inc.)

To: The Commission

PETITION FOR LIMITED WAIVER OF
NEXTEL PARTNERS, INC.

Donald J. Manning, Esq.
Vice President & General Counsel
Todd B. Lantor, Esq.
Chief Regulatory Counsel
NEXTEL PARTNERS, INC.
4500 Carillon Point
Kirkland, WA 98033

Laura H. Phillips
Jason E. Friedrich

DRINKER BIDDLE & REATH LLP
1500 K Street, NW, Suite 1100
Washington, DC 20005-1209
(202) 842-8800

Its Attorneys

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SUMMARY

In 1999, the Federal Communications Commission adopted aggressive roll out schedules for all Commercial Mobile Radio Service (CMRS) licensees to provide Enhanced 911 (E911) automatic location identification services to Public Safety Answering Points (PSAPs) using either network-based or handset-based technologies that were not yet fully developed. After careful technical evaluation of the performance of these alternatives, Nextel Partners, Inc. (Nextel Partners) selected a handset-based, assisted-GPS (A-GPS) Phase II implementation strategy.

Due to the proprietary nature of Motorola iDEN technology used by iDEN networks, neither Nextel Partners nor Nextel Communications, Inc. (NCI) could meet the Commission's initial deadline to begin selling at least one entry-level location-based handset model for the simple reason that Motorola had to design and develop an iDEN-capable A-GPS handset. In 2000, Nextel Partners and NCI jointly requested, and in 2001 received from the Commission, a revised implementation schedule that contained a range of A-GPS handset activation compliance benchmarks. The handset activation benchmark dates were relaxed to reflect the minimum additional time necessary for Motorola to develop a functional iDEN-based A-GPS handset. Notwithstanding the additional time needed for A-GPS development applicable to iDEN networks and the concomitant delay in getting A-GPS handsets into customers' possession, in granting the initial waiver, the Commission maintained the same end date of December 31, 2005 for Nextel Partners to achieve 95 percent customer penetration of A-GPS capable handsets. This effectively shortened Nextel Partners' compliance window by a full year. In setting its original four-year penetration timetable, the Commission apparently relied upon the estimates of consultant studies in the record of anticipated customer churn and handset replacement rates that,

over time, proved to be overly optimistic. In Nextel Partners' case, with lower than industry average churn rates and one year less to reach the 95 percent penetration benchmark, the timetable is not realistic.

This waiver request addresses only the 95 percent customer handset penetration deadline date of December 31, 2005. Through customer handset upgrade and incentive plans, customer handset churn and continuing growth and buildout, Nextel Partners worked aggressively to meet each E911 compliance benchmark related to A-GPS handset activations. Progress towards the goal of 95 percent customer A-GPS handset penetration, however, has been complicated by the unanticipated Motorola software glitch that occurred in July, 2004, that effectively wiped out Phase II location capability in *all* those A-GPS handsets already in the hands of Nextel Partners customers, as well as those A-GPS handsets in stores and warehouses ready to be shipped. To rectify this software error, Nextel Partners, with the assistance of Motorola, reprogrammed hundreds of thousands of handsets in the hands of its customers as well as those A-GPS handsets within Nextel Partners' inventory. The company maintains significant continuing efforts to alert those customers with affected A-GPS handsets and to complete the required handset reprogramming at no cost to these customers. Despite this, there are still over two hundred thousand A-GPS handsets in use by Nextel Partners customers today that have not had the required software upgrade, and cannot be used for Phase II E911 service. This unanticipated technical problem with Motorola A-GPS phones should be taken into account by the Commission in considering Nextel Partners' limited request for additional time to comply with the 95 percent benchmark.

Another significant obstacle to timely compliance with the 95 percent penetration benchmark is customer unwillingness to replace or upgrade handsets that are fully functional

with new handsets that have no perceived additional functionality from the customer's perspective. Despite Nextel Partners' past and continuing incentive programs and subsidy payments designed to encourage early handset upgrades, and other no-cost equipment upgrades, customers simply are not replacing existing handsets with new handsets capable of Phase II operation. Tellingly, despite these programs, ongoing advertising and special offers, approximately sixty percent of the phones in the hands of Nextel Partners subscribers are the original phones these subscribers selected at initiation of their wireless service.

Another factor in reaching 95 percent A-GPS handset penetration is Nextel Partners' lower than industry average customer churn, which adds to the length of time that the Commission can reasonably anticipate that a carrier's customer base will change. Since grant of Nextel Partners' initial E911 implementation waiver request in October of 2001, the company has maintained an average churn rate of 1.51 percent per quarter. Nextel Partners churn rate continues to decrease – in the second quarter of 2005, for example, Nextel Partners' churn rate was 1.34 percent. Further, Nextel Partners customers are often large corporate or government users that do not swap out their phones until the end of a contract term or until there is a manifest technical problem with a particular phone.

It would be ironic for the Commission to fail to grant Nextel Partners a reasonable extension of this last E911 compliance benchmark because it has subscribers who are satisfied with their handsets and with the range of services Nextel Partners provides. Failure to grant a waiver effectively would punish a carrier that has demonstrated it responds effectively to market forces and to customer demands. Thus, the Commission should revisit its earlier assumptions about high industry-wide churn and handset replacement rates and recalibrate them to reflect a more realistic timetable for carriers to achieve 95 percent penetration. Alternatively, the

Commission should grant Nextel Partners a limited extension until December 31, 2007 to reach the 95 percent A-GPS handset penetration benchmark within its network.

Consistent with the Commission's waiver standards, this request to extend the Phase II handset penetration deadline demonstrates a set of concrete steps towards full compliance. Nextel Partners has shown a strong commitment towards meeting the Commission's handset penetration goals as soon as reasonably possible. Nextel Partners continues its customer outreach programs either to upgrade the software in the defective Motorola A-GPS handsets or to swap older, non-A-GPS handsets for new handsets. Nextel Partners submits that, under the circumstances, the public interest will be served by the Commission allowing Nextel Partners an additional limited period of twenty-four months, until December 31, 2007, to achieve 95 percent penetration of A-GPS handsets capable of completing Phase II calls to requesting PSAPs.

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7. Affidavit of David Aas, Vice President, Engineering and Technical Operations of Nextel Partners, Inc.

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**PETITION FOR LIMITED WAIVER OF
NEXTEL PARTNERS, INC.**

Pursuant to Sections 1.3 and 1.925 of the Federal Communications Commission's (Commission's) rules, Nextel Partners, Inc. (Nextel Partners) respectfully requests a limited waiver of Commission rule section 20.18(g)(l)(v).¹ This particular rule requires commercial mobile radio service (CMRS) providers utilizing handset-based E911 Phase II solutions to achieve ninety-five percent penetration of automatic location identification (ALI)-capable handsets within their subscriber base by December 31, 2005.² As demonstrated herein, Nextel

¹ 47 C.F.R. § 20.18(g)(l)(v).

² On June 30, 2005, a Joint Petition was filed with the Commission by CTIA and the Rural Cellular Association requesting suspension or waiver of the Commission's December 31, 2005 location-capable handset penetration deadline. See Joint Petition for Suspension or Waiver of the Location-Capable Handset Penetration Deadline, CC Docket No. 94-102 (filed June 30, 2005). The CTIA/RCA Petition lays out a range of possible criteria by which the Commission might consider wireless carriers to be in substantial compliance with its rules. This waiver request fits squarely within most, if not all, of the CTIA/RCA Petition's proposed criteria. CTIA/RCA Petition at 11-12. The Commission recently put the CTIA/RCA Petition on Public Notice. See *Wireless Telecommunication Bureau Requests Comment on Joint Petition of CTIA and RCA Regarding the December 31, 2005 Deadline for Licensees Employing the December*

Partners has taken and continues to take all reasonable steps necessary to achieve this penetration benchmark, including meeting all other handset activation benchmarks established as part of the joint Nextel Communications Inc. (NCI) and Nextel Partners, Inc. (Nextel Partners) request for waiver of the Commission's Phase II implementation timetable.³

The Commission grants waivers for "good cause shown."⁴ "Good cause" is established where the particular facts faced by the petitioner would make strict compliance with a Commission rule inconsistent with the public interest, and where the relief requested would not undermine the policy served by the rule.⁵ Nextel Partners respectfully submits that good cause exists in this case for a limited extension of the final 95 percent penetration compliance benchmark until December 31, 2007.

31, 2005 Deadline for Licensees Employing A Handset-Based E911 Phase II Location Technology To Achieve Ninety-Five Percent Penetration of Location-Capable Handsets Among Their Subscribers, Public Notice, DA 05-2677, WT Docket No. 05-286 (rel. October 7, 2005). The National Association of Regulatory Utility Commissioners (NARUC), a non-profit group that represents state regulators, just filed comments in support of the CTIA/RCA suspension/waiver petition. *See* Comments of NARUC 2-3, WT Docket No. 05-288 (filed October 17, 2005).

³ Nextel Communications, Inc. and Nextel Partners, Inc. Joint Report on Phase II Location Technology Implementation and Request For Waiver, CC Docket No. 94-102 (filed November 9, 2000).

⁴ 47 C.F.R. § 1.3.

⁵ *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*) *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *see also Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (waiver appropriate where "particular facts would make strict compliance inconsistent with the public interest"); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, CC Docket 94-102, 15 FCC Rcd 17442 at ¶43 (2000) (*Fourth Memorandum Opinion and Order*).

I. BACKGROUND

Nextel Partners provides fully integrated, wireless digital communications services using the Nextel brand name in mid-sized and rural markets throughout the United States. Nextel Partners was created to accelerate the build-out and to expand the reach of the Nextel Digital Wireless Network in such markets. Nextel Partners has exclusive rights to offer the same fully integrated, digital wireless communications services as NCI in mid-sized and rural markets in 31 states where approximately 54 million people, or POPs, live and work.

Nextel Partners constructed and operates a digital mobile network in thirteen of the top one hundred metropolitan statistical areas (MSAs) and fifty-six of the top two hundred MSAs in the United States as ranked by population. These services include International and Nationwide Direct Connect,SM digital cellular service, short messaging and cellular Internet access, which provides users with wireless access to the Internet, and to an organization's internal databases as well as other applications, including e-mail. As of June 30, 2005, Nextel Partners had approximately 1,805,100 digital service subscribers.

As of December 31, 2004, Nextel Partners had established digital wireless service in thirty-nine company-created markets across the United States. Eleven of those markets have a population of less than a million people and two of those markets have less than a half a million people. Only five of Nextel Partners' markets have over two million people. This relatively sparse teledensity presents a more challenging service environment for Nextel Partners compared to other "national" carriers.⁶ Notwithstanding the characteristics of Nextel Partners'

⁶ For example, in Nextel Partners' West Texas market, it has 11 covered POPs per square mile. In its South Dakota market, it has 10 covered POPs per square mile and in its North Dakota market, it has 7 covered POPs per square mile.

markets, the relationship between Nextel Partners and NCI seamlessly extends the national reach and power of the Nextel nationwide network into these remote and underserved markets providing customers in places like Dothan, Alabama with the same advanced Nextel products and services at substantially the same prices as are available in urban markets such as Atlanta, Georgia. Thus, Nextel Partners brings cutting edge wireless technology to areas that otherwise might be overlooked by large, national service providers.

Nextel Partners is a party to a previous E911 waiver petition relating to implementation timetables.⁷ In the *Nextel Waiver Order*, the Commission imposed the following Phase II E911 implementation benchmarks on Nextel Partners and NCI:

- October 1, 2002:** Begin selling and activating A-GPS-capable handsets and ensure that at least one entry-level A-GPS-capable handset model is available;
- December 31, 2002:** Ensure that at least 10 percent of all new handsets activated are A-GPS-capable;
- December 1, 2003:** Ensure that at least 50 percent of all new handsets activated are A-GPS-capable;
- December 1, 2004:** Ensure that 100 percent of all new digital handsets activated are A-GPS-capable.

Nextel Partners met each of these A-GPS handset activation benchmarks.⁸ Based on its particular circumstances as discussed herein, Nextel Partners requests the grant of a limited

⁷ *In the Matter of Revision of the Commission's Rules To Ensure Compatibility With Enhanced 911 Emergency Calling Systems, Wireless E911 Phase II Implementation Plan of Nextel Communications, Inc.*, Order, 16 FCC Rcd. 18277, ¶ 19 (2001) (*Nextel Waiver Order*).

⁸ As previously reported to the Commission, as of May 2004, all of the handsets Nextel Partners activated on its network were A-GPS capable with the limited exception of those legacy BlackBerry 7510 models remaining in inventory. See Nextel Partners, Inc. Phase I and Phase II E911 Quarterly Report, CC Docket No. 94-102 (filed May 3, 2004).

waiver that would allow it until December 31, 2007 to reach the final benchmark of ninety-five percent penetration of ALI-capable handsets among its customers.

II. NEXTEL PARTNERS IS NOW A UNIQUELY SITUATED "TIER I" CMRS PROVIDER FOR PURPOSES OF THIS PROCEEDING.

Nextel Partners provides digital wireless telecommunications services using its own iDEN network under the Nextel brand name in thirty-nine mid-sized and rural U.S. markets. Viewed on its own, Nextel Partners is not a "national" carrier as that term is used in the Commission's E911 waiver orders and rules.⁹ With approximately 1.7 million subscribers and \$1,368,427,000 in operating revenues for the year ending December 31, 2004, Nextel Partners is by far the smallest carrier classified as "Tier I" for E911 compliance purposes. In fact, at year end 2001, Nextel Partners had a base of 515,900 subscribers, only slightly above the ENHANCE 911 Act's definition of a Tier III carrier.¹⁰

As the Commission is aware, Nextel Partners uses proprietary Motorola iDEN technology. Motorola is the sole source provider of Nextel Partners handsets, and that sole source relationship was the reason that NCI and Nextel Partners required and requested

⁹ In a previous *Order*, the Commission referred to six national CMRS carriers as having "national footprints." *See Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers*, Order to Stay, 17 FCC Rcd 14841, ¶ 7 (2002) (*Order to Stay*).

¹⁰ "Qualified Tier III Carrier Defined. – In this section, the term "qualified Tier III carrier" means a provider of commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)) that had 500,000 or fewer subscribers as of December 31, 2001." *See* ENHANCE 911 Act, P.L. 108-494, at § 107(b) (2004). Section 107(a) of the ENHANCE 911 Act states that the Commission "shall grant the waiver of compliance with the requirements of section 20.18(g)(1)(v) of the Commission's rules. . . requested by the petition if it determines that strict enforcement of the requirements of that section would result in consumers having decreased access to emergency service." *See* ENHANCE 911 Act, P.L. 108-494, at § 107(b) (2004). The Commission previously adopted this same definition of Tier III carriers. *See Order to Stay*, 17 FCC Rcd 14847 at ¶ 22.

additional time from the Commission in November of 2000 to allow Motorola the time necessary to develop iDEN phones capable of Phase II performance standards.¹¹ This sole source supply issue was cited by the Commission as a factor supporting the grant of a waiver in the *Nextel Waiver Order*.¹²

While Nextel Partners and NCI filed jointly and had identical network technology considerations at the time of the initial E911 waiver filing in November of 2000, circumstances have changed that make separate consideration of this current Nextel Partners waiver request appropriate.¹³ On August 8, 2005, the Commission approved the merger of NCI and Sprint and that transaction closed on August 12, 2005.¹⁴ This corporate combination creates a new set of circumstances for both NCI and Nextel Partners that bears upon each carrier's ability to meet their E911 compliance benchmarks. NCI, for example, reported to the Commission in a July 11, 2005 *ex parte* letter that its proposed merger with Sprint would result in NCI reaching the 95 percent penetration goal more quickly: "Nextel continues to believe that a combined Sprint

¹¹ While Motorola continues to be far and away the main handset provider to Nextel Partners, Nextel Partners also sells BlackBerry handsets that are manufactured by Research in Motion (RIM).

¹² The Commission recognized that "iDEN is a proprietary Motorola technology and, to the extent that a location technology requires new or modified handsets and network equipment, Nextel must rely on Motorola as a sole source provider." *Nextel Waiver Order* at ¶ 19.

¹³ See Sprint Nextel Corporation Request for Limited Waiver, CC Docket No. 94-102 (filed September 29, 2005) (*Sprint Nextel Waiver Request*). The Commission recently put the Sprint Nextel Petition on Public Notice. See *Wireless Telecommunications Bureau Requests Comment on Sprint Nextel Request for Limited Waiver of the December 31, 2005 Deadline to Achieve Ninety-Five Percent Penetration of Location-Capable Handsets Among Its Subscribers*, Public Notice, DA 05-2677, WT Docket No. 05-286 (rel. October 7, 2005).

¹⁴ *Applications of Nextel Communications, Inc. and Sprint Corporation; For Consent to Transfer Control of Licenses and Authorizations; File Nos. 0002031766, et al.*, Memorandum Opinion and Order, 2005 FCC LEXIS 4524, FCC 05-140, WT Docket No. 05-63 (2005) (rel. August 8, 2005).

Nextel would be able to achieve the 95 percent penetration rate faster than Nextel would be able to do on its own.”¹⁵ NCI also stated in its response to a Commission request for information on how the merger would affect the merged entity’s ability to comply with its E911 rules that “it is reasonable to assume that the merger may in fact prove affirmatively helpful.”¹⁶ Plainly the Sprint Nextel Corporation is quantitatively and qualitatively different than the pre-merger NCI in its ability to draw handsets from suppliers other than Motorola and its ability to leverage a newly-combined customer base from which to calculate its E911 compliance benchmarks.

The recently completed Sprint Nextel merger will allow the combined company “to take numerous steps to comply with the FCC’s Benchmark” including an aggressive marketing campaign to its increased customer base and further acceleration of internal churn rates through the availability of new handsets with enhanced data features.¹⁷ In contrast, Nextel Partners has no present plan with Sprint Nextel to rely upon the metrics of the former Sprint customer base to assist in meeting a 95 percent A-GPS handset penetration compliance benchmark by year’s end. While, as discussed herein, Nextel Partners took literally the same actions as NCI to meet its E911 compliance benchmarks and experienced the same Motorola software glitch that also adversely affected NCI’s efforts to achieve broad customer penetration of A-GPS phones, it is not feasible for the Commission to consider Nextel Partners and Sprint Nextel Corporation as

¹⁵ NCI explained that the “merger is expected to result in quicker development of new technologies and services, thus making new handsets more attractive and increasing churn of older handsets. The marketing of services between the two companies may generate greater crossover of existing customers, resulting in higher sales of GPS-enabled handsets on both networks. Finally, the sales momentum of both entities is expected to increase with increased scale, resulting in more new customers purchasing GPS-enabled devices.” *Ex Parte* Letter of Nextel Communications, Inc., CC Docket No. 94-102 (filed July 11, 2005).

¹⁶ See *Sprint-Nextel Merger, Response to Request for Information, FCC Interrogatory No. 27*, filed May 20, 2005, available at <http://www.fcc.gov/transaction/sprint-nextel.html>.

¹⁷ See *Sprint Nextel Waiver Request* at 4-5.

one and the same in judging the suitability of this limited waiver request. Nextel Partners is now in the unusual position of having been classified, along with NCI in 2001, as a Tier I nationwide carrier. However, when considered on its own now, Nextel Partners would not be classified as a "Tier I" carrier for E911 compliance purposes.

The standard for a waiver based on changed circumstances is that the change rise to the level of a unique or unusual circumstance to satisfy the criteria for grant of a waiver.¹⁸ In the context of E911 implementation, the Commission has recognized specifically that "changed circumstances" may warrant grant of a waiver.¹⁹ The Sprint Nextel merger represents just such a circumstance for Nextel Partners. Nextel Partners' present E911 compliance posture vis-à-vis the final implementation benchmark must be considered based upon its own actions, circumstances and path to full compliance, as proposed in this waiver request.

A. Nextel Partners' Service Areas Include Significant Rural Territory.

Nextel Partners was formed in 1999 as a joint venture with NCI specifically for the purpose of accelerating the deployment of mobile services to those areas outside of the major urban markets that had been built out by NCI. When it was founded in January of 1999, Nextel Partners served fewer than 50,000 customers in just two markets. Today, Nextel Partners has more than 1.8 million customers. In less than six years, the company built out its network in

¹⁸ *NorthStar Technology, LLC; Request for a Waiver and Extension of the Broadband PCS Construction Requirements Regarding BTA098 Block F Authorization*, Order on Reconsideration, 19 FCC Rcd 22275, ¶ 13 (2004). See also 47 C.F.R. 1.925(b)(3)(ii).

¹⁹ For example, in evaluating Enterprise Wireless PCS, LLC's petition for waiver of the November 30, 2004 deadline to ensure that one-hundred percent of handsets activated are location-capable, the Commission noted that, "If changed circumstances have affected Enterprise's need for relief of the Commission's sale and activation benchmarks, we would expect Enterprise to submit further requests for waiver relief." *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order, 20 FCC Rcd 7709, ¶ 133 (2005).

over thirty states, and Nextel Partners' licensed territory covers a population base of approximately 54 million people. To achieve these service milestones, Nextel Partners constructed over 4,000 cell sites, the vast majority of which provide coverage to people who work and reside in mid-sized markets and in rural communities.

In fact, Nextel Partners serves several mid-size and rural markets in Louisiana, Mississippi and Texas that were devastated by Hurricanes Katrina and Rita.²⁰ Because Nextel Partners has operations in Florida that were affected in 2004 by Hurricane Ivan, Nextel Partners was well prepared for the necessary network repair and recovery efforts required by both Hurricanes Katrina and Rita. Nextel Partners restored service very quickly in the affected markets, thus greatly enhancing public safety and mobile communications capability in these markets in the aftermath of the hurricanes.²¹

Notably, all of Nextel Partners' customers, even those in the most rural areas of its network coverage, receive the same service benefits available to their more urban counterparts, including: access to a fully digital nationwide network; national and international Direct ConnectSM service²² which allows for fast and extremely cost-effective communications, wireless access to the Internet, mission-critical interoperability for public safety users, mobility and large

²⁰ Nextel Partners estimates 20 percent of its Gulf Coast network, which spans from Beaumont and Port Arthur, Texas, through Lafayette, Louisiana, and from Gulfport, Mississippi to Panama City Beach, Florida, was effected by loss of power and local telecommunications outages caused by wind and flooding. See Press Release, Nextel Partners, Inc., Nextel Partners Restores Service in Areas Hardest Hit by Hurricane Rita (September 27, 2005).

²¹ See Press Release, Nextel Partners Restores Wireless Service to Gulf Coast; Technicians Work Tirelessly in Hardest Hit Regions; Company Supports American Red Cross Effort with Donations (September 6, 2005).

²² Nextel Partners was the first CMRS carrier to bring Direct ConnectSM push-to-talk service to customers in these markets. So, for example, a Nextel Partners' customer in Bosco, Louisiana can use Direct ConnectSM service to reach instantly an NCI customer in Los Angeles, Washington, D.C. and even internationally in, for example, Buenos Aires, Argentina.

local calling areas. Additionally, these services are provided at substantially the same rates as are offered in more urban markets and without any assessment of roaming charges. Moreover, Nextel Partners, as a wireless carrier, brings to citizens in rural and mid-size markets the benefit of customer choice that serves as both a compliment to, as well as a potential alternative to, traditional wireline telephone service.

B. PSAPs in the Markets Nextel Partners Serves Are By and Large Not Phase II Ready.

The Commission recognizes that smaller carriers may face extraordinary circumstances in meeting the Phase II deployment deadlines.²³ Indeed, the Commission explicitly recognizes that a CMRS carrier E911 waiver request might be required by circumstances “beyond its control.”²⁴ In addition to NCI’s merger with Sprint and a lower than expected customer and handset churn rate, Nextel Partners’ service territory itself contains certain challenges for any wireless carrier deploying A-GPS handsets because a large number of Public Safety Answering Points (PSAPs) are not Phase II capable, thus limiting the appeal of A-GPS capable phones in those markets.

Despite these challenges, Nextel Partners devoted and continues to devote substantial resources to E911 deployment. Nextel Partners, for example, is the only CMRS carrier to have

²³ See 20 FCC Rcd 7714 at ¶ 9. See also *Order to Stay*, 17 FCC Rcd 14846 at ¶ 20 (recognizing that wireless carriers with relatively small customer bases are at a disadvantage as compared with the large nationwide carriers in acquiring location technologies, network components, and handsets needed to comply with our regulations); *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems; E911 Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers*, Order to Stay, 18 FCC Rcd 20987, ¶ 17 (2003) (*Tier III Order to Stay*).

²⁴ See 20 FCC Rcd 7715 at ¶ 10.

deployed Phase II service in the state of Hawaii. Nextel Partners works cooperatively with a wide range of nearly 900 PSAPs that face different challenges in deploying upgraded E911 services to the public themselves. Approximately half of the PSAPs in the markets Nextel Partners serves are not Phase II ready.²⁵ In addition, Nextel Partners' operating territory serves 196 PSAPs that cannot deliver more than basic 911 calling capability (Phase 0). To date, Nextel Partners has deployed Phase I service to 689 Public Safety Answering Points and Phase II E911 service to 432 PSAPs. Since its August 2, 2005 Quarterly Report to the Commission, Nextel Partners provided an additional eighteen PSAPs with E911 Phase I service and one additional PSAP with E911 Phase II service.

III. NEXTEL PARTNERS' WAIVER REQUEST SATISFIES THE COMMISSION'S E911 WAIVER STANDARD.

Pursuant to Section 1.3 of its rules, the Commission may waive any rule provision, in whole or in part, if good cause is shown.²⁶ Under the standards of *WAIT Radio*, the Commission finds that "good cause" exists where the particular facts faced by the petitioner would make strict compliance inconsistent with the public interest, and where the relief requested would not undermine the policy served by the rule.²⁷ Moreover, under Section 1.925, the Commission will grant a request for waiver if in view of unique or unusual factual circumstances, application of

²⁵ This largely mirrors the national average of PSAP Phase II readiness. *See No Signal – Cellphone Hangup: When You Dial 911, Can Help Find You? — As More People Go Wireless, Patchwork of Call Centers Slows Locator System — Upgrade Money Spent on Boots*, Wall St. J., May 12, 2005, at A1 ("Virtually all of the nation's 6,000 call centers can locate land-line phones, but only 41 percent of them can locate cellphones"). *See, e.g.*, Comments of NARUC at 3, WT Docket No. 05-288 (filed October 17, 2005). NARUC's comments in support of the CTIA/RCA Petition state that good cause exists for the Commission to suspend the 95 percent handset penetration because, among other things, E911 Phase II service is not available in the majority of U.S. counties.

²⁶ 47 C.F.R. § 1.3.

²⁷ *See WAIT Radio*, 418 F.2d at 1157 (D.C. Cir. 1969).

the rule would be contrary to the public interest or the waiver applicant has no reasonable alternative.²⁸

In its *Fourth Memorandum Opinion and Order*, the Commission stated that requests for waivers of the E911 rules should be “specific, focused, and limited in scope, and with a clear path to full compliance” and that carriers “should undertake concrete steps necessary to come as close as possible to full compliance.”²⁹ In its subsequent *Order to Stay*, the Commission provided further guidance as to the type of showing that would demonstrate good cause for a grant of relief by stating that the Commission “generally finds good cause to grant a waiver of its rules where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.”³⁰

Plainly the Commission’s policy objective, as reflected in its handset penetration benchmark, is to achieve near-ubiquitous status of A-GPS handsets by all handset-based wireless carriers so ALI-capable handsets are available to be used for Phase II E911 calls where PSAPs are capable of using Phase II information. A 95 percent benchmark appropriately recognizes that a 100% penetration rate is not realistic – some customers will retain their older phones despite the inducements carriers provide to encourage handset replacement. In the case of Nextel Partners, the 95 percent benchmark can be achieved, but strict adherence to the Commission’s December 31, 2005 deadline under the circumstances would not advance the public interest.³¹

²⁸ 47 C.F.R. § 1.925.

²⁹ *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17457 at ¶ 44 (2000).

³⁰ *Tier III Order to Stay*, 18 FCC Rcd 20987 at ¶ 19 (2003).

³¹ See, e.g., Letter from Sheriff Wendell Hall, Santa Rosa County, Florida attached at Exhibit 1.

The Commission recognized the “distinct challenges” that rural-based wireless carriers face in implementing Phase II requirements.³² Additionally, the Commission recognized that temporary extensions of its “selling and activating” benchmarks will not delay actual deployment of E911 Phase II because “PSAPs in smaller or rural areas ... may well require additional time to become capable of receiving and utilizing Phase II information.”³³

In the markets served by Nextel Partners, over half of the PSAPs are not yet Phase II capable and thus an extension of the final compliance benchmark would have no effect on E911 calling whatsoever in those markets. In fact, many PSAPs place a higher priority on wireless carriers expanding geographic signal coverage to allow greater range of calling capability for all calls than they do on wireless carriers reaching a particular A-GPS handset penetration threshold.³⁴

In the case of Nextel Partners’ waiver request, the relief requested is both focused and limited in scope. Rather than a broad, open-ended waiver, Nextel Partners seeks a twenty-four month extension of the final 95 percent handset penetration benchmark. Given current trends in its customer churn rate and the continuation of aggressive handset upgrade incentive programs, Nextel Partners believes it can reach a 95 percent penetration level of A-GPS handsets capable of Phase II functions by no later than December 31, 2007.

³² See, e.g., *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fifth Memorandum Opinion and Order, 15 FCC Rcd 22810, ¶ 21 (2000) *aff'd* U.S. Cellular Corp. v. FCC, 254 F.3d 78 (D.C. Cir. 2001). Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442 at ¶ 70 (2000).

³³ *Order to Stay*, 17 FCC Rcd 14845 at ¶ 15.

³⁴ See, e.g., Letter from Sheriff Wendell Hall, Santa Rosa County, Florida at Exhibit 1 (“As public safety officials, we place the highest priority on reliable signal coverage in our area to guarantee our ability to reach people in need of public safety assistance.”)

This request is supported by several considerations. First, in the case of E911 implementation generally, the Commission accepted assumptions from studies placed into the record by E911 equipment and software vendors regarding the constant turnover of customers and handsets that showed wireless carriers could achieve a nearly ubiquitous level of location-capable handsets within four years without significant effort. These churn assumptions have proved optimistic, and in any event were not revisited as part of the extensions of A-GPS activation benchmarks the Commission granted to NCI and Nextel Partners that shortened the effective compliance window by an entire year.³⁵

In the case of Nextel Partners, despite strong handset upgrade incentive programs heavily subsidized by Nextel Partners, customers have proved to be more reluctant than initially expected to replace their handsets, even when the upgrade is offered at no cost to the customer.³⁶ Strict application of the final benchmark would be unwarranted where the Commission's predictive judgment in setting the December 31, 2005 deadline was predicated upon overly optimistic assumptions regarding customer handset replacement rates.³⁷

³⁵ Part of the reason the Commission cited for maintaining the December 31, 2005 penetration deadline was NCI's "anticipation" that "the commercial features to be introduced as a result of A-GPS integration will give existing subscribers an incentive to upgrade their handsets." NCI also observed that 3G services should enhance the value of location-based handsets, thus speeding their public acceptance. *Nextel Waiver Order* at ¶ 22. In the recent Sprint Nextel waiver filing, the company made plain that these anticipated handset replacement rates could not be realized due to customer behavior and market changes. *See Sprint Nextel Waiver Request* at 14-21.

³⁶ *See, e.g., Comments of NARUC* at 3, WT Docket No. 05-288 (filed October 17, 2005) ("Even in those areas where the PSAP upgrades have been completed, some consumers will not want to go through the hassle of replacing a functioning handset. The process of learning new features, reformatting speed dials and other settings, and purchasing accessories often outweighs location capability.")

³⁷ Reviewing courts recognize that the FCC must review its predictive judgments when circumstances change. *See, e.g., Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) (deferring to the Commission's predictive judgment "with the caveat, however, that,

Second, the rate at which Nextel Partners was achieving significant customer penetration of A-GPS handsets was interrupted abruptly by the unanticipated Motorola software glitch in July 2004, that literally overnight reset the number of Motorola A-GPS handsets capable of rendering Phase II service to zero. While Nextel Partners immediately took and continues to take all necessary actions to recover, this software glitch that was entirely beyond Nextel Partners' control without question has an adverse effect on the current A-GPS penetration numbers associated with Nextel Partners' customer base. While Nextel Partners, with the continuation of its existing programs, could have achieved nearly 85 percent penetration of Phase II capable A-GPS handsets by December 31, 2005, the Motorola software malfunction will result in Nextel Partners reaching an estimated 74.2 percent functional A-GPS handset penetration rate by year's end.

Finally, the Commission's observation regarding the status of PSAP readiness in more rural markets has proved accurate for the majority of Nextel Partners' markets. Only 432 of the nearly 900 PSAPs in Nextel Partners' territory as a whole have upgraded their equipment to become Phase II capable. One hundred ninety six of these PSAPs lack the resources to become even Phase I ready.

should the Commission's predictions . . . prove erroneous, the Commission will need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decisionmaking") (emphasis in original); *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998) (deferring to the Commission's predictions about the level of competition, but stating that, if the predictions do not materialize, the Commission "will of course need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decision-making").

A. The Commission's Assumptions Regarding Customer Churn Leading To Rapid Handset Replacement Have Not Been Realized.

A basic component of the Commission's decision establishing what the agency then viewed as feasible handset penetration timetables was the Commission's belief that routine handset upgrades and carrier churn, when combined with its handset activation benchmarks, would yield a 95 percent A-GPS handset penetration rate within four years. At the time the Commission set its initial benchmarks in 1999, it relied upon an admittedly optimistic estimate furnished by E911 service and equipment vendors with a vested interest in the establishment of strict deadlines – observing that with an industry-wide annual churn of 24 percent per year (*i.e.*, 2 percent per month), and with high projections of new sales and retrofits, 100 percent of handsets would be location-capable within three years “without extraordinary measures being taken by carriers.”³⁸ The Commission also cited another report estimating a 25.63 percent churn per year leading to only a 73 percent penetration of location-capable handsets over the course of four years.³⁹

Even as the Commission waived interim activation benchmark dates due to the demonstrated hardships that Nextel Partners and NCI faced getting A-GPS capable handsets that could work on proprietary iDEN networks, the Commission retained Nextel Partners' final benchmark date of December 31, 2005 for 95 percent penetration. Thus, rather than a four-year timetable from initial activation of A-GPS to 95 percent penetration, Nextel Partners had just over three years from the time A-GPS handsets were available to it to reach 95 percent handset

³⁸ *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Third Report and Order, 14 FCC Rcd 17388, ¶ 50 fn. 71 (1999) (citing data and projections from a 1998 report on the wireless industry by Donaldson, Lufkin & Jenrette submitted into the record by TruePosition).

³⁹ *See id.* at ¶ 50, fn. 72 (citing IDC Additional Comments II at 8 and Exhibit 2).

penetration. As circumstances demonstrate, a three-year timetable would have been problematic even without the Motorola software glitch. While Nextel Partners estimates it could have achieved a nearly 85% penetration level by year end without the Motorola software problem, customer adoption of A-GPS handsets, even with heavy phone subsidies, would not have ensured that Nextel Partners could have met the 95% benchmark by late December of 2005.

Given its business customer focus and strong customer service, Nextel Partners has a lower than industry average customer churn rate. One consequence of this is that the rate of handset replacement inevitably is slower than that associated with higher customer churn. Experience in attempting to persuade users to upgrade defective handset software or to swap their handsets demonstrates that Nextel Partners customers are generally content with their phones and their resistance to no-cost or heavily subsidized handset upgrade offers demonstrates that they perceive little benefit in trading in their phones for handsets that have Phase II location capability. Some reasons for customer resistance to swapping their handsets are plain – some non-GPS handsets are heavier and may be perceived as more durable than current A-GPS models. For businesses with many handsets, there is a loss of employee productivity associated with taking employees out of the field to a centralized location to swap out handsets, particularly if they are not using any commercial GPS functions. In addition, customers are reluctant to upgrade their new handsets because it requires them to reprogram their new handset with information already in their current handsets (*e.g.*, contacts, call forwarding information). Overall, as demonstrated by Nextel Partners' customers' behavior, from most customers' perspectives, there is no increased functionality associated with replacing a non-GPS handset or an A-GPS handset affected by the Motorola software glitch with a Phase II compliant handset.

A large portion of Nextel Partners' customer base are enterprise or government agency accounts that typically have long-term equipment replacement cycles. These large account customers outfit an entire team or workforce with handsets that typically are not replaced or upgraded for several years. Upgrading handsets to A-GPS capable handsets outside of the normal replacement cycle, even if it is at no cost, simply is not appealing to this substantial segment of Nextel Partners' customer base. In fact, approximately 60 percent of Nextel Partners group subscribers continue to use their original handsets. Despite this built-in reluctance, Nextel Partners has assigned account representatives to contact these customers on an ongoing basis to encourage the upgrading of handsets.

To the extent the Commission also relied upon the advent of wireless local number portability in November 2003 to increase customer churn as customers were able to switch wireless carriers but continue to use their wireless telephone number, that reliance proved unwarranted. As the Commission itself concluded, "porting has not caused churn to significantly increase, but is likely contributing to additional quality measures being taken by carriers to retain customers."⁴⁰ As one financial analyst remarked, "LNP never proved to be the threat to the carriers envisioned. . . churn is likely to stay relatively stable, at least for the foreseeable future, because of the aggressive marketing plans and the efforts made by the LECs to bundle products [including wireless]."⁴¹ Former Wireless Telecommunications Bureau Chief John Muleta

⁴⁰ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Tenth Report, WT Docket No. 05-71, FCC 05-173 (rel. September 30, 2005) (*Tenth Competition Report*).

⁴¹ *Year After LNP Deadline, Wireless Churn Rate Remains Flat*, Communications Daily, November 16, 2004.

remarked that wireless customer churn actually decreased following wireless LNP implementation because "people invested in customer service."⁴²

Reliance on customer churn and subsidized handset upgrade programs, however aggressive the program, has not proven to be an effective means to timely reach the Commission's 95 percent penetration benchmark by December 31, 2005. Given the circumstances, the Commission should waive the penetration benchmark deadline. The Commission should refrain from punishing those wireless carriers that have made significant investments in networks and customer service that, in turn, result in lower customer churn that has the inevitable consequence of slowing handset penetration rates.

B. The Motorola A-GPS Software Failure Adversely Affects Nextel Partners' Timely Compliance.

As Nextel Partners previously reported to the Commission, on July 19, 2004, Nextel Partners' sole handset vendor, Motorola, notified Nextel Partners of a software problem affecting Motorola's i205, i305, i530, i710, i730, i733, i736, and i830 handsets.⁴³ A latent problem in these phones' software rendered all A-GPS services unusable as of midnight, GMT, July 18, 2004. To ensure that the A-GPS software problem did not cause Phase II E911 calls from those particular handsets to drop, Nextel Partners had to temporarily disable the network component of its Phase II E911 A-GPS service, thus transmitting to PSAPs the caller's voice, nearest cell site location, and call-back number, *i.e.*, Phase I E911 information. All PSAPs then operational or

⁴² *LNP Called Example of Good Regulation of Powell's FCC*, Communications Daily, March 16, 2005.

⁴³ See Nextel Partners, Inc. Phase I and Phase II E911 Quarterly Report, CC Docket No. 94-102 (filed Aug. 2, 2004). As Nextel Partners then reported to the Commission, "All PSAPs, currently deployed Phase II, were contacted by July 21 and informed of our current conditions and the steps we were taking to rectify the situation." *Id.* at 5.